IN THE

Supreme Court of the United States

October Term, 1954.

No. 153.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

DREXEL & CO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR DREXEL & CO. IN OPPOSITION TO PETITION.

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INDEX TO BRIEF.

TABLE OF CASES CITED.

STATUTES CITED.

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QUESTIONS PRESENTED FOR REVIEW.

1. Does the jurisdiction of the Securities and Exchange Commission over fees in connection with reorganization or liquidation proceedings under Section 11 of the Public Utility Holding Company Act of 1935 extend to fees for professional services rendered to a holding company (not itself being reorganized in the proceedings) in connection with the protection of its interest in one of its subsidiaries which was being reorganized in the proceedings, where the fee is to be paid by the parent and not by or out of the assets of the subsidiary?

2. Assuming that the Securities and Exchange Commission had jurisdiction, did it, in determining the amount of the fee to be allowed to respondent, give proper weight to the amount agreed upon between respondent and its client?

3. Again assuming that the Commission had jurisdiction, was the order, by which it reduced to $50,000 the fee of $100,000 agreed upon between the respondent and its client, supported by substantial evidence? Was not such action by the Commission arbitrary, capricious, an abuse of discretion, and not in accordance with law?

COUNTER-STATEMENT OF THE CASE.

This case arises out of a proceeding before the Securities and Exchange Commission (the Commission) for the liquidation of Electric Power and Light Corporation (Electric) under Section 11(e) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, USC Title 15 §§ 79 et seq. (the Act), as required by the Commission by order entered August 22, 1942 (11 S. E. C. 1146).

Electric was a subsidiary of Electric Bond and Share Company (Bond & Share). Both were holding companies as defined in the Act.

Between November 6, 1945 and March 25, 1948, a number of plans for the liquidation of Electric were filed with the Commission in this proceeding, and hearings held thereon. All these plans, however, for one reason or another were abandoned or withdrawn, and none ever reached the point of approval by the Commission.

On March 25, 1948 Electric filed a plan (the Plan) for compliance with the Act, which was in due course approved by the Commission on March 7, 1949, enforced by the District Court on April 22, 1949, and finally consummated. Bond & Share was not a party to this Plan, nor did it participate in the filing thereof. The Plan dealt exclusively

with Electric and its assets (R. 4, 34). Except as a debtor to and security holder of Electric, Bond & Share was in no way affected by the Plan. It was not the corporation being reorganized or dissolved in the proceeding.

In May of 1945, Bond & Share, believing that it needed expert financial advice to protect its very large investment in the securities of Electric [1], had retained Drexel & Co. (Drexel), a firm with wide experience in such matters, to advise it in connection with the dissolution proceedings then pending under the Act with respect to Electric. In this capacity Drexel rendered substantial professional services to Bond & Share over a period of more than three years, until after the Plan had been developed and agreed to by most of the parties concerned (R. 262-264).

In the Plan, Electric had, *inter alia*, agreed to pay such fees and expenses of parties to and participants in the proceedings as the Commission should allow (R. 34-35).

Bond & Share agreed with Drexel that $100,000 was fair and reasonable compensation for its services in this matter (R. 55; see also R. 198-199). Accordingly, after consummation of the plan, Bond & Share and Drexel in due course filed appropriate applications with the Commission

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1. The capitalization of Electric as of December 31, 1947, on a consolidated basis, excluding dividend arrearages of $74,019,558 on its preferred stocks, was as follows (see Vol. I, pp. 201, 203 of the unprinted record):

Subsidiaries:	
Debt, Preferred Stock, and minority interest in Common Stock	$273,741,924.
Electric:	
Preferred Stock	76,959,267.
Second Preferred Stock	7,481,400.
Common Stock and Surplus	117,648,724.
	$475,831,315.

Bond & Share owned 57.23% of the Common Stock and 18.59% of the Second Preferred Stock of Electric, plus warrants to purchase shares of its Common Stock (R. 7).

(R. 54, 59), requesting its approval of a fee of $100,000 to Drexel for services rendered to Bond & Share, *to be paid out of the estate of Electric.*

On April 21, 1952, the Commission entered its findings, opinion, and order (R. 212, 269), in which it approved the payment of a fee of only $50,000 to Drexel, but directed that this *be paid by Bond & Share, not by Electric.*

Bond & Share did not contest this order, but determined that it would itself pay the Drexel fee (R. 283), and abandoned its prior position that the fee should be paid by Electric. Consequently, no part of whatever fee Drexel receives will now be paid by or charged to Electric or its estate.

Upon the filing by the Commission with the District Court for the Southern District of New York of an application to enforce the Commission's order with respect to fees (R. 270), Drexel filed exceptions thereto, in so far as it related to its fee (R. 278). The District Court dismissed the exceptions and confirmed the Commission's order (R. 288).

On appeal, the action of the District Court was reversed by a unanimous decision of the United States Court of Appeals for the Second Circuit, with an opinion by Chief Judge Chase (R. 305), on the ground that under the facts of this case the Commission had no jurisdiction over a fee which was to be paid entirely by Bond & Share.

In both the District Court and the Court of Appeals two questions were presented and argued on behalf of Drexel: *first*, that the Commission was without jurisdiction to reduce the Drexel fee; and *second*, that its action in so doing gave insufficient weight to the agreement between Drexel and Bond & Share, was not supported by substantial evidence, and was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

The Court below, having disposed of the case on jurisdictional grounds, never reached the second question.

ARGUMENT.

I. Introduction.

The Commission, in its petition for a writ of certiorari, alleges (p. 7) two reasons for the granting of the writ: (i) that the case presents an important question of Federal law which should be settled by this Court, and (ii) that the decision below conflicts "at least in principle" with a decision of the Court of Appeals for the District of Columbia Circuit.

It is respectfully submitted that each of these suggested reasons is without merit.

Before considering the arguments made by the Commission, however, it is important to understand and to have in mind the basis for the decision of the Court below and the other Court decisions on the general question of the jurisdiction of the Commission over fees for services performed in connection with plans and proceedings under Section 11 of the Act.

The first case to arise was *In Re Electric Bond and Share Company*, 80 F. Supp. 795, decided in 1948 by Judge Knox of the Southern District of New York. In that case the Commission had by order awarded a fee, to be paid out of the estate of National Power & Light Company (which was the company in reorganization under Section 11 of the Act), for services rendered in the proceedings by the claimant as counsel for a stockholder of that company. This order was enforced by Judge Knox, who dismissed objections by the claimant to the jurisdiction of the Commission.

In his opinion, Judge Knox conceded that Section 11(e) of the Act contained no provisions expressly conferring fee jurisdiction on the Commission. But he concluded that, so far as the case before him was concerned, this jurisdiction was clearly to be implied from the express power given

the Commission to pass on the fairness of a plan, saying, at p. 798 of 80 F. Supp.:

> "Section 11(e) gives to the SEC the duty to determine in the first instance whether a plan is fair and equitable. It must so find before there can be any court enforcement. I agree with the SEC that jurisdiction over fees is an inseparable part of the determination of whether a plan is fair and equitable."

In every subsequent case involving this question (including the present case, see R. 307-308) the same result has been reached.[2]

The rule of law which is clearly and conclusively established by all these decisions, and the reasoning on which it is based, may be stated thus:

> In a proceeding under Section 11 of the Act, the Commission has jurisdiction over all fees which will be paid out of assets dealt with in the plan approved by the Commission. Such jurisdiction, though not expressly granted in Section 11(e), is implied by the Courts on this reasoning: since the Act requires the Commission, before it may approve a plan, to find it to be fair and equitable, and since payment of improper or excessive fees *out of the assets dealt with in a plan* which the Commission had approved as fair might well result in rendering such plan unfair, it is essential, to enable the Commission properly to exercise its power with respect to the fairness of a plan, that it be empowered to control and approve all such fees.

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2. See the following:

Halstead v. S. E. C., 182 F. 2d 660 (C. A. D. C. 1950).

S. E. C. v. Cogan, 201 F. 2d 78 (C. A. 9, 1952).

In Re North American Light and Power Co., 202 F. 2d 638 (C. A. 3, 1953); certiorari denied — U. S. —, 74 S. Ct. 30.

In Re Public Service Corporation of New Jersey, 211 F. 2d 231 (C. A. 3, 1954).

Standard Gas & Electric Co. v. Securities and Exchange Commission, 212 F. 2d 407 (C. A. 8, 1954).

The difference between the cases which established and applied the above rule and the present case is so obvious as to require little comment.

In the present case the Drexel fee will *not* be paid by Electric, which was the company reorganized in the proceedings, or out of its assets, which were dealt with in the Plan. Whatever fee Bond & Share, a wholly solvent corporation which was not the subject of the Section 11 proceedings now in question, may be willing to pay Drexel cannot conceivably affect the fairness of the Plan for Electric. Thus the basis for the Commission's fee jurisdiction as sustained in the other cases is non-existent in the present case.

Such was the decision of the Court below.

We should here point out to the Court that the Commission has made a statement with reference to the compensation to be received by Drexel which, due to a quotation taken out of context, we believe is misleading. On page 5 of its petition it states that "both Drexel and Bond & Share understood that the amount to be paid would be 'such amount as might be approved by the Commission' (R. 193)."

What Mr. Hopkinson (the Drexel senior partner) actually said at page 193 was that in the only conversation he ever had with Bond & Share with respect to fees it was agreed

> "that nobody could tell the extent of the work or what it was going to involve and I was warned that it would be subject in all probability to approval by the Securities and Exchange Commission anyway, so there didn't seem to be much point in trying to do anything more.
>
> "We understood they would pay us, of course, for our services, but they could only pay us, they believed, such amount as might be approved by the Commission.

"Q. There was no formal agreement entered into between you and Bond & Share?

"A. No, sir."

All of this would have been entirely correct if Bond & Share had succeeded in its original effort to have Electric pay the Drexel fee or reimburse Bond & Share for any amount paid by it, for then the Commission would unquestionably have had jurisdiction over the amount. And this was what the parties had contemplated at the time the conversation took place.

In any event, this testimony, we submit, falls far short of showing an agreement that the Drexel fee would be limited to such amount as might be approved by the Commission.

II. No Important Question of Federal Law Is Involved in the Decision of the Court Below.

The Commission has by now substantially completed its duty under Section 11 of the Act to require the various holding company systems throughout the United States to so readjust their capitalizations and holdings as to bring them into conformity with the statutory requirements.

When the few remaining pending cases are completed, the requirements of Section 11 will have been fully complied with by all holding companies, and none of the various problems in connection with the liquidation, recapitalization, or reorganization of holding companies, or the services required in connection therewith, or the compensation to be paid therefor, will again arise.

In its petition for certiorari, in support of its assertion that the decision of the Court below involves an important question of Federal law, the Commission says on page 8:

"There are currently pending before the Commission at least four proceedings, involving fee applications of several millions of dollars, in which this issue is involved."

And on page 23, it amplifies this statement as follows:

"There are presently pending before the Commission in various stages at least four reorganizations, where fee applications have been filed and the question at issue is involved. In the case of the Standard Power & Light Corporation system, the claims which involve this issue, in whole or in part, run over $3,500,000. In the United Corporation, Northern New England, and Pennsylvania Gas and Electric systems comparable issues are involved."

These statements, however, are not correct. An examination of these cases, as explained below, will show that in each of these four reorganizations the Commission, under the well established principles (*supra*, p. 6), clearly has complete jurisdiction over all fees there claimed. The issue in the present case, therefore, can not be involved in any of those cases and the decision in the present case could never have any application to any of them.

Standard Power and Light Corporation case. Here both *Standard Power and Light Corporation* (the top holding company) and *Standard Gas and Electric Company* (its subsidiary) were or are being liquidated or reorganized in proceedings before the Commission under Section 11 in accordance with plans approved by the Commission.

Four applications for fees are now pending (see Commission order of May 14, 1954, Holding Company Act Release No. 12496) for services rendered in connection with the plans and proceedings. Three of these are claims (aggregating $57,500 in amount) against Standard Power and Light Corporation by counsel for certain of its stockholders. The fourth is a claim for a fee of $3,500,000 filed against

Standard Gas and Electric Company by counsel [3] for stockholders of that corporation.

To the extent that these claims are allowed, they will be paid out of the estates of the corporations which were before the Commission in the proceedings and were dealt with in the plans approved by the Commission. Allowances of fees out of such estates, as the court below stated, could obviously affect the fairness of the plans to persons affected by them, i.e., persons who were to receive securities of the company which, or the predecessor of which, was required to pay the fees in question.

Northern New England Company. In this case two companion Section 11(e) plans were filed by *Northern New England Company* (the top holding company), and by *New England Public Service Company* (its subsidiary) in the same proceedings then pending before the Commission. (Commission file No. 59-15). Each plan provided for the liquidation of the Company concerned and the distribution of its assets to its stockholders.

On February 13, 1953 (see HCAR [4] No. 11711) the Commission entered a single order in which it approved both plans as fair and equitable. They have now been consummated.

There are now pending before the Commission a number of applications for fees in this matter, filed on behalf of counsel and other representatives of each of the two companies and various groups of their respective security holders. Any fees allowed will be paid out of assets now or

3. We are advised that these counsel advance the contention that they have created or preserved a large fund in the course of proceedings before the District Court, and that on the basis of this special circumstance the District Court has inherent equity power to award them compensation under the principle enunciated by this Court in *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939). Obviously, the instant case does not in any way involve any such issue.

4. The abbreviation HCAR, when used in this brief, refers to Holding Company Act Releases issued by the Commission.

formerly belonging to either or both of the two companies, which were dealt with in the plans.

Pennsylvania Gas & Electric Corporation (Commission file Nos. 54-165 and 54-177). Here the required reorganization of both the holding company and its subsidiaries under Section 11 of the Act was accomplished under a single plan, which was filed in the proceedings before the Commission and approved by it. This plan provided for the liquidation and dissolution of the parent holding company, the recapitalization of its subsidiaries, and the distribution of the stocks of these subsidiaries among the stockholders of the parent. The plan provided that all fees should be payable by the parent company or one of its subsidiaries, as the Commission should approve.

The fee applications which are now pending cover services rendered in connection with the reorganization proceedings, which involved both the recapitalization of the various subsidiaries and the liquidation of the parent. All fees paid will be paid out of assets which were before the Commission and dealt with under the plan.

In the three cases last above mentioned, although they may involve fee applications for services rendered to a parent company, the parent company itself was in each case reorganized or dissolved in the proceedings, the estate and assets of the parent company were in each case before the Commission and were dealt with by the plan which the Commission approved as fair. Consequently, in each case any fees payable by the parent company will be paid out of the estate dealt with under the plan and might therefore affect the fairness of the plan.

None of these pending cases can be affected by the decision of the Court below in the case at bar, since the very foundation of that decision is that the Drexel fee *will not* be paid out of the assets of Electric which were dealt

with by the Plan and *could not* therefore affect to any extent whatever the fairness of the Plan.

United Corporation—Columbia Gas & Electric Corporation. In this case *The United Corporation* (United), the statutory parent of *Columbia Gas & Electric Corporation* (Columbia), retained counsel and other experts to advise it with respect to a plan filed by Columbia in 1944 in proceedings before the Commission for reorganization of Columbia under Section 11 of the Act. United was not being reorganized in these proceedings nor were its assets dealt with under that plan.

The plan was eventually abandoned, but United, under date of June 13, 1947, filed with the Commission a request that the Commission require Columbia to reimburse United for fees and expenses, aggregating $124,350, incurred by it in connection with the plan. Columbia promptly denied any liability for such reimbursement. There the matter now rests. No further action has been taken to date, presumably because the parties have been awaiting a final and authoritative decision in some other case upon the legal question of whether a subsidiary may be required to reimburse its parent for expenses of the latter in connection with the reorganization of the subsidiary.

The only application now pending before the Commission is the application of United to be reimbursed by Columbia. Obviously the Commission has jurisdiction over such application, since if the reimbursement is permitted it will be paid out of the estate or assets of Columbia which were before the Commission and dealt with in the reorganization proceedings.

Thus the issue upon this pending application of United is altogether different from the present case and is one which will in no way be controlled or affected by the decision of the Court below.

III. There Is No Conflict Between the Decision of the Court Below and Any Other Court Decision.

As the Court below said (R. 306), this case presents a question "as to which no direct decision has been called to our attention or found by us."

As we have already pointed out (*supra*, p. 6) there have been a number of cases which involved Commission jurisdiction over fees payable out of assets of the company being reorganized or dealt with under an approved plan. In every such case the jurisdiction of the Commission has been sustained.

But, until the present case arose, there has been no reported case in any Court dealing with the Commission's powers over fees which are not paid or to be paid, directly or indirectly, from the estate of the corporation the subject of the Section 11 proceedings or out of assets dealt with by the plan.

There is therefore no conflict between the decision of the Court below and any other existing decision.

The Commission argues (p. 18 of its petition) that the opinion below is in conflict, at least in principle, with *Halstead v. Securities & Exchange Commission*, 182 F. 2d 660 (C. A. D. C. 1950). We submit there is no conflict between the cases.

The *Halstead* case was considered by the Court below, which rightly held it inapplicable, saying (R. 308):

> "In the *Halstead* case the issue was the power of the Commission to prevent the solicitation by a stockholder's committee of contributions to pay the fees of its counsel *where it was announced by the committee that it would ultimately seek payment of the fees solely out of the estate of the company being reorganized.*[5]

5. In the opinion in the *Halstead* case, at p. 666 of 182 F. 2d, the Court said:

> "Beyond question the coverage of section 11(f) includes fees payable in the court proceedings from company funds, and it is from those funds (and solely from those funds) that the committee here involved has announced it will ultimately seek its compensation."

> Thus * * * the eventual payment of the fees might reduce what persons affected by the plan would otherwise receive for their interest in the reorganized company." (Emphasis supplied.)

Our attention has been called to the fact that in two other petitions for a writ of certiorari now pending in this Court (*Standard Gas and Electric Co. v. S. E. C.*, October Term, 1954 No. 218; and *The United Corporation v. S. E. C.*, October Term, 1954 No. 99) the petitioners have each asserted that there is a conflict between the decision of the Court below in the case at bar and the decisions which the petitioners are respectively seeking to have this Court review.

The facts and issues in each of these two other cases are, for all substantial purposes, identical. We submit that in each case they are wholly different from the present case, and that there is no conflict whatever between these two cases on the one hand and the present case on the other.

The *Standard Gas and Electric Co.* case (No. 218) arose out of a reorganization or liquidation of the Northern States Power Companies (two statutory subsidiaries of Standard Gas and Electric Company (Standard)) which was accomplished under Section 11 proceedings before the Commission. Standard was not itself reorganized in the proceedings, but both it and some groups of its stockholders participated therein, to protect the investment of Standard in the stock of the subsidiaries.

After consummation of the reorganization, counsel for Standard and its stockholders filed applications with the Commission for fees and expenses, to be paid by the Northern States Companies, i.e., out of the assets which had been before the Commission and dealt with under the plan.

The Commission found and ordered, however, that these fees and expenses, in the sum of $88,000, were properly chargeable to Standard and not to the Northern States Companies. Standard thereupon paid these claimants and sought reimbursement in the District Court from the Northern States Companies, after the Commission filed its application for enforcement of the fee allowances. The District Court upheld the order of the Commission. Standard appealed, and the Court of Appeals affirmed. (*Standard Gas and Electric Company v. Securities & Exchange Commission*, 212 F. 2d 407 (C. A. 8, 1954)).

The United Corporation case (No. 99) arose out of the dissolution and liquidation of Public Service Corporation of New Jersey, a statutory subsidiary of The United Corporation (United), under Section 11 proceedings before the Commission. United, though not itself directly involved in the proceedings, appeared and participated to protect its investment in the stock of its subsidiary which was so involved.

After completion of the proceedings, United applied to the Commission for an order directing that its expenses of $33,580.86 in connection with the dissolution proceedings should be paid by Public Service Electric and Gas Company, successor to Public Service Corporation of New Jersey, which had been the subsidiary of United. The Commission refused and directed that United itself bear these expenses.

The decision of the Commission was reviewed directly by the Court of Appeals under Section 24(a) of the Act, and the action of the Commission was affirmed (*In Re Public Service Corporation of New Jersey*, 211 F. 2d 231 (C. A. 3, 1954)).

It will therefore be seen that in each of these two cases the sole question involved was whether the parent company would itself have to bear the fees and expenses incurred by

it in the proceedings for the reorganization of its subsidiary, or whether it could legally obtain reimbursement therefor from the subsidiary. At no stage in the court proceedings in either case was any question raised by anyone as to the jurisdiction of the Commission, nor was there any dispute over the amount of the fees. The only issue was as to who should pay them.

In no respect is there the slightest conflict between either of these cases and the decision of the Court below in the present case.

On pages 21 and 23 of its petition, footnotes 11 and 12, the Commission lists a number of cases in which it states that "the Commission has passed upon the fees to be paid to representatives of parent holding companies for services rendered in connection with the reorganization of their subsidiaries."

This statement implies that each of these cases was similar to the present case, namely, that the amount of the fees was at issue and was actually decided by the Commission, and that such fees were paid out of assets which were not dealt with under the plan approved by the Commission.

This, however, by no means is the case.

Due to the difficulty of obtaining sufficient information as to the exact facts in each of these cases, it has not been possible for us to make an analysis of all of them to find out to what extent, if at all, they involved the same issue as the present case. We do know, however, that in a number of them (e.g., *Public Service Corporation of New Jersey*, HCAR No. 12000, and *Northern States Power Company*, HCAR No. 11145, among others) the parent company and the subsidiary were reorganized together under the same

plan, which dealt with all the assets out of which the fees were to be paid.

In many other cases, it appears that not only was no question raised as to the jurisdiction of the Commission, but there was no dispute concerning the amount of the fees, and the Commission took no affirmative action but merely interposed no objection to the payment of the agreed fee. For examples of such cases, see *The United Corporation*, HCAR 6509, *United Gas Corporation*, HCAR 5677, *Derby Gas & Electric Corporation*, HCAR 3236, *National Power & Light Company*, HCAR 7172. Such cases, involving no issue or dispute, could certainly not be considered an acquiescence by the parties in the jurisdiction now asserted by the Commission. Much less could they bind others who were not parties.

Others of the cases cited (as, for example, *Niagara Hudson Power Corporation*, HCAR 11667) were like the *Standard Gas and Electric Co.* and *The United Corporation* cases (*supra*, p. 14), where the issue was not the jurisdiction of the Commission but merely whether the fees and expenses incurred by the parent company could be recouped by it from the subsidiary.

In still other cases (for example, *Louisville Gas & Electric Company*, HCAR 9346, *Central States Utilites Corporation*, HCAR 9411, *Pennsylvania Edison Company*, HCAR 9988, *Interstate Power Company*, HCAR 11359), the parent had agreed, in the plan or otherwise, to pay whatever fees should be awarded by the Commission, which agreement would, of course, preclude it from thereafter questioning the jurisdiction of the Commission to approve and award such fees.

In any event, we submit that no weight can be given to the decisions of the Commission in these various cases without a detailed demonstration that they involved the same question as is involved in the present case. Such a demonstration is wholly lacking.

IV. Brief Discussion of the Merits.

A. *The Commission Was Without Jurisdiction Over the Drexel Fee.*

The Commission, both in the Court below and in its petition for certiorari in this Court, points to a number of sections of the Act from which, so it argues, its jurisdiction over the fees to be paid by a solvent parent for services in connection with the liquidation or reorganization of a subsidiary can be inferred.

The argument that such jurisdiction can be derived from Sections 11(e) and 11(f) was so fully considered by the Court below (R. 306-310) that we need here add nothing more, except to point out that Senator Wheeler's remarks and the Senate Committee report quoted on pages 12 to 13 of the petition for certiorari were referring, not to the Act as finally enacted, but to Senate Bill 2796 as originally introduced, which clearly did give the Commission jurisdiction over all fees. After these remarks and that report, and before enactment, the Bill was amended to cut down the all-inclusive jurisdiction contemplated in the original Bill, as stated in note 9 on pages 16-17 of the petition.

The Commission also argues (petition pp. 9-12) that its asserted jurisdiction can be supported by the provisions of Sections 7, 10, and 12 of the Act. These same arguments were made in the Court below, which presumably did not consider they had sufficient merit to require any discussion.

Under these sections, certain fees payable by holding companies in connection with the issuance of some (but not all) securities and the acquisition of some (but not all) securities and other assets are specifically made subject to Commission approval. Since a reorganization under Section 11 of the Act will ordinarily involve, as an incidental element in the larger plan, a transfer or acquisition of

assets or an issue or acquisition of securities, the Commission argues that the jurisdiction expressly given over fees to be paid in connection with such a particular feature of the plan was enough to create an implied jurisdiction over all fees payable with respect to the entire over-all plan.

We submit that to state such a proposition is to answer it. If, as the Court below held, neither Section 11(e) nor Section 11(f) gives the Commission jurisdiction over fees such as are involved in this case, certainly it cannot obtain any help from Sections 7, 10, or 12 of the Act.

Indeed, it has been expressly held that the provisions of Section 7 of the Act (and the same would, of course, apply as well to Sections 10 and 12) need not be complied with in proceedings under Section 11. *Public Service Commission of New York v. S. E. C.*, 166 F. 2d 784 (C. A. 2, 1948), cert. den. 334 U. S. 838.

At pages 14 to 15 of the petition, the Commission relies on *American Power & Light Company v. S. E. C.*, 325 U. S. 385 (1945), affirming 143 F. 2d 945 (C. A. 2, 1944), a case which is mentioned and held inapplicable without much discussion in the opinion of the court below. The Commission cites this case as holding that a stockholder of a parent company was a "person * * * aggrieved" by an order affecting its subsidiary. By analogy, it argues that in the present case each stockholder of Bond & Share must be considered a "person affected", within the meaning of the Act, by the Section 11(e) Plan for Electric.

In making this argument, however, the Commission has omitted to state that in the case cited by it the holding of the Supreme Court was based on the fact that the interest of the stockholder of the parent company was "in the nature of a derivative or stockholder's action. Inasmuch as he charged illegality and fraud, * * * application to the Board of Directors would have been futile" (325 U. S. at p. 392).

That this would not be true in the ordinary case is shown by *Okin v. S. E. C.*, 143 F. 2d 943 (C. A. 2, 1944), a case which was decided by the same Court (the Court of Appeals for the Second Circuit) and on the same day as the *American Power & Light Company* case.

In that case plaintiff was a stockholder of Electric Bond and Share Company, which was a minority stockholder of American Power & Light Company, which in turn owned all the outstanding stock of Florida Power & Light Company. Plaintiff appealed from orders of the Commission directing the action to be taken by the Florida Company to comply with the Holding Company Act.

The Court held that the plaintiff was a mere shareholder, who had not satisfied the usual requirements as to derivative suits, and that he was, therefore, not a "person aggrieved", and had no standing to appeal from these orders.

The Commission (p. 19 of its petition) complains that "The court below did not cite *Leiman v. Guttman*" (336 U. S. 1). This, however, is not surprising, since the Commission never referred the Court below to that case and never made before it the argument, now found for the first time on pp. 17-19 of its petition, that the decision in that case was applicable to the present case.

Be this as it may, however, the language of the statute considered in *Leiman v. Guttman* is so different from the Act that a decision under the one is of no value in construing the other.

B. *The Commission Erred in Reducing the Drexel Fee.*

As we have already stated (*supra*, p. 4), when this case was before the Court below, in addition to the question of the Commission's jurisdiction there was also presented and argued the second question of whether the action of the Commission, in reducing the Drexel fee from the $100,000 agreed upon between it and Bond & Share to $50,000 (R.

264), gave due weight to their agreement, and whether such action was supported by substantial evidence. The Court below, having concluded the Commission had no jurisdiction over the fee here involved, never reached or discussed in its opinion this second question.

While it is probably not appropriate for us to enter at this time into any extended discussion on the merits with respect to the reduction by the Commission of the fee, we believe that the Court should know that this other question is involved in the case and that it, as well as the jurisdiction question, might properly constitute the basis for the affirmance of the Court below.

In this case Bond & Share and Drexel, bargaining at arm's length, agreed upon a fee of $100,000. The Commission in its Findings and Opinion (R. 262-264) never even referred to this agreement and presumably considered it wholly immaterial.

It has, however, been held in three recent Court of Appeals cases that in any case where the Commission has jurisdiction over fees in a proceeding under Section 11 of the Act, the amount of the fee agreed upon between the client and its professional adviser is a relevant and important fact which must be considered and given due weight by the Commission in connection with its approval or disapproval of such fee.

In each of these cases, the Commission was reversed for having ignored or given insufficient weight to the agreement.

See *In Re North American Light and Power Company*, 202 F. 2d 638 (C. A. 3, 1953; certiorari denied, — U. S. —, 74 S. Ct. 30) where the Court stated:

> "* * * the Securities and Exchange Commission exercised its power over fees in the way that was not just and reasonable when it awarded Masterson attorney's fees in an amount less than that sought by him and agreed upon by his client, the North American Light & Power Company."

Again, in *Standard Gas & Electric Co. v. Securities and Exchange Commission*, 212 F. 2d 407 (C. A. 8, 1954), the Court stated (at p. 412):

> "Under the circumstances, the Commission should have accorded greater weight to the contractual relationship between the parties. * * * under the facts presented here, the agreement between counsel and company was not given its true evidentiary weight by the Commission."

And *In Re Public Service Corporation of New Jersey*, 211 F. 2d 231 (C. A. 3, 1954), the Court said:

> "* * * The Commission apparently had in mind the significance of the lawyer-client arrangement with respect to the amount of the fee but failed to properly evaluate it against the present background. * * * As we see it all indications from the record are that the amount submitted was the fee which petitioners, after arm's length discussion with their client, were willing to accept as reasonable compensation for their endeavors and which their client felt they had earned and was willing to pay them. There is no substantial support for the Commission's finding that the figure requested by the petitioners was excessive in relation to their services or that the payment of that amount would be unfair to the public security holders."

In the present case the only testimony as to the value of Drexel's services is that of Mr. Hopkinson, senior partner of Drexel (R. 120-196), and that of Mr. Ginsburg, vice-president of Bond & Share (R. 197-211). Each stated that $100,000 was fair and reasonable. There was no testimony to the contrary from any one.

It is therefore submitted that the findings of the Commission that $50,000 was a fair and reasonable fee is not supported by any evidence at all, let alone by substantial evidence in the light of the record as a whole, as required

by *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474 (1951).

Under these circumstances, we submit that the denial by the Commission of the $100,000 fee agreed upon was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

It is accordingly respectfully submitted that the petition for certiorari should be denied.

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